EXHIBIT J

Brief of Defendant-Appellant,
Clarendon Nat'l Ins. Co. v. Atlantic Risk Mgt., Inc., 2008 WL 8162169

2008 WL 8162169 (N.Y.A.D. 1 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, First Department, New York.

CLARENDON NATIONAL INSURANCE COMPANY, Plaintiff-Respondent,

v.

ATLANTIC RISK MANAGEMENT, INC., Defendant-Appellant.

No. 5303.
October 16, 2008.

Brief for Defendant-Appellant

Jordan Sklar, Babchik & Young, LLP, Attorneys for Defendant-Appellant, 200 East Post Road, 2nd Floor, White Plains, New York 10601, (914)470-0001.

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Cases

***1** *Preliminary Statement*

Defendant-appellant Atlantic Risk Management, Inc. ("ARM"), submits tins brief in support of its appeal from several decisions of the Trial Court which have consistently denied ARM the discovery it needs to properly and fully defend itself in this action.

As discussed further below, ARM respectfully submits that the trial court misapprehended material facts in determining that ARM is not entitled to complete disclosure from Clarendon National Insurance Company ("Clarendon.") Clarendon seeks to recover from ARM, its third-party administrator ("TPA"), sums that Clarendon allegedly incurred due to ARM's purportedly improper claims handling on Clarendon's behalf. The single largest claim, discussed further below, involved an underlying claimant, Leroy Pittenger and a Clarendon insured, Kephart Trucking Corporation.

Although the parties have exchanged thousands of pages of documents, and have conducted many depositions, and are in the midst of others, still more discovery remains outstanding. ARM respectfully submits that such extensive discovery is warranted in an action where plaintiff seeks over $5 million from defendant. In most pertinent part, ARM submits that Clarendon has failed to comply with discovery into its true and correct claims handling practices. The ***2** trial court denied defendant's motion seeking an Order compelling plaintiff to specifically identify (and set forth the rational for), the instances where Clarendon:

(i) disclaimed coverage when ARM, or some other TPA, recommend that coverage be denied;

(ii) awarded coverage even though ARM or some other TPA said that coverage should be denied;

(iii) disclaimed coverage when ARM or some other TPA said that coverage should be awarded; and/or

(iv) awarded coverage when ARM or some other TPA recommended that coverage be awarded.

Summary of Discovery

The following chart summarizes the discovery and related decisions at issue in this appeal:

Defendants' Discovery	*Motion Date*	*Trial Court Decision*
First Set (R-80-93), and Second Set (R-277-290)	May 22, 2007 (R-191-380)	December 6, 2007 and December 19, 2007 (R-6-7; and R-13-15)
Third Set (R-485-495), and Fourth Set (R-573-582)	January 17,2008 (R-427-661)	July 14,2008 (R-28-30)
Fifth Set (R-787-797)	March 25, 2008 (R-764-814)	August 5, 2008 (R-21-22)

***3** *Question Presented*

1. Did the trial court commit reversible error when it decided that ARM was not entitled to all the discovery it needed to defend itself in this multi-million dollar case.

Answer: Yes.

***4** *Statement of Facts*

ARM was TPA for Clarendon. As such, it performed claims administration for Clarendon: it reviewed coverage, drafted reservation of rights letters and proposed denials of coverage that were sent to Clarendon for approval. However, most crucial to the issue at hand, ARM needed Clarendon's specific approval to deny coverage. The Claims Administration Agreement ("CAA," R-217-241) between Clarendon and ARM provides, in pertinent part that Clarendon:

(i) shall retain ultimate control and responsibility of the functions that it has delegated hereunder, and

(ii) has and will retain the final authority over decisions and policies regarding claims administration, including without limitation, the payment or non-payment of claims.

(R-239)

The CAA also provides, at section 3.2, that:

Where the Company [i.e., Clarendon] makes a determination as to coverage, any liability, loss, cost or expenses relating to such coverage shall be borne solely by the Company and the Company shall hold the Administrator [i.e., ARM] harmless with regard to same.

(R-225)

***5** In 2003, ARM was notified of an underlying bodily injury case brought by claimant Leroy Pittenger ("Pittenger") against Kephart Trucking ("Kephart,") a Clarendon insured. (R-56) Pittenger commenced a Worker's Compensation claim against Kephart and pressed such claims against Kephart as he would be entitled to as an employee. In light of what appeared to be an "employee/employer" relationship, ARM drafted a proposed denial of coverage and forwarded it to Clarendon. (R-265). As per the CAA, Clarendon reviewed the proposed denial of coverage. Following that review, Clarendon approved the denial and it was sent to Kephart. (R-265) In light of that denial, neither Clarendon nor ARM appointed counsel to defend Kephart in the underlying Pittenger case (Action No. 1) (R-265).

Despite having already retained counsel in connection with Pittenger's Worker's Compensation claim, Kephart did not retain counsel to defend it in the Pittenger litigation (Action No. 1)(R-266), and Pittenger obtained a default judgment against Kephart. Even though Kephart knew that it could move to vacate the default, and considered and pondered doing so it allowed the default to stand. (R-266). After an uncontested inquest in Action No. 1, Pittenger was awarded approximately $3.5 million against Kephart. Kephart assigned its claim against Clarendon to Pittenger and Pittenger commenced an action against Clarendon seeking payment of the default judgment (Action No. 2)(R-668-708).

***6** Clarendon ultimately settled Action No. 2 for slightly in excess of $4.6 million. (R-65). Clarendon now sues ARM, alleging that ARM was responsible for the incorrect denial of coverage (R-52-69.) Clarendon seeks reimbursement of the $4.6 million it paid to Pittenger and attorneys' fees for the costs it incurred defending itself in Action No. 2.

Discovery At Issue

On or about June 30, 2006, ARM served Clarendon with an initial set of discovery demands (R-80-93), that had two broad thrusts. First, ARM sought information about the underlying Pittenger claim (Action No. 1), and about the coverage case against Clarendon (Action No. 2). Second, ARM sought discovery to explore Clarendon's apparent contention that it performed virtually no independent analysis of claims submitted to it, relied exclusively on ARM to provide it with information about claims and, essentially, merely "signed off on" whatever ARM recommended.

Specifically, ARM served Clarendon with a variety of interrogatories and document demands designed to explore Clarendon's claims handling practices and procedures. These included:

Interrogatory 3. Identify each claim on which Clarendon National Insurance Company ("Clarendon") disclaimed coverage based upon a recommendation from Atlantic Risk Management, Inc. ("ARM") for the years 1997 through 2005. For each such disclaimer:

***7** (a) Identify the insured that submitted the claim;

(b) Identify the representative of ARM who recommended that the disclaimer be issued;

(c) Identify the representative of Clarendon who reviewed the ARM recommendation;

(d) Produce copies of all documents relating to the recommendation to disclaim and the acceptance and/or rejection of the recommendation.

(R-83)

Interrogatory 8. Identify any claims, damage or alleged loss submitted to Clarendon, or any agent on its behalf, arising out of, connected to, or raised against Kephart, including but not limited to the claim submitted by or on behalf of Leroy R. Pittenger.

(R-83)

Interrogatory 9. Identify all individuals, entities or organizations who were involved in connection with analyzing any claim for loss, damage or alleged loss submitted by or on behalf of Kephart, including but not limited to the claim by Leroy R. Pittenger, including but not limited to any determination whether any policy of coverage issued to Kephart afforded coverage for the claim submitted by or on behalf of Leroy R. Pittenger.

(R-83)

In its initial responses to ARM's first set of discovery demands (R-107-136), Clarendon provided no response whatsoever to Interrogatory number 3 and, as concerns Interrogatories 8 and 9, alluded only to the subject Pittenger claim.

***8** After numerous correspondences from defense counsel (R-248-256), Clarendon (R-141-145), claimed that there is no way to respond to these demands absent a manual review of scores of "hard copy" claims files.

Furthermore, since Clarendon repeatedly asserted (*e.g.*, R-119-120, responses to Interrogatories 15 and 16), that it "does and always has administered claims pursuant to...the applicable law," Clarendon was asked to:

Identify any and all means by which Clarendon was kept abreast of legal developments within the insurance industry, including but not limited to grounds for denying coverage to a Clarendon insured during the period 1996 through 2004. (R-121, Interrogatory 18).

Here, too, Clarendon initially refused to answer (R-121), but later amended its response to claiming that responsive information and documents could be found in the various claims files. (R-141-145) However, Clarendon flatly refused to produce any of these claims files. Instead, Clarendon demanded that ARM travel to Florida (where most of the files are allegedly maintained), and then pay Clarendon to have the documents made available for inspection.

Also focusing on Clarendon's actual claims handling practices, ARM asked Clarendon to identify other TPA's Clarendon utilized so that ARM could conduct its own investigation. In its initial responses, Clarendon identified only ARM (and the "in-house" entity that replaced ARM), as the TPA's that worked with Clarendon from 2000 on. (R-123-124) This list was far from complete and Clarendon was again asked to identify all Third Party Administrators, claims ***9** administrators, etc. that worked with Clarendon from 2000 to date. In its supplemental responses (R-145), Clarendon produced what it claimed was a list of Third-party Administrators (R-314-316) However, as attested to in an affidavit from ARM's principal, Otto Kieslich, (R-272), this list is, in fact, a list of Managing General Agents. Managing General Agents are not TPA's. Managing General Agents are generally involved in the underwriting process and do not handle claims on Clarendon's behalf. (R-272) Although Clarendon was asked to provide a listing of the TPAs used by Clarendon, it has refused to do so. [1]

In a further effort to explore Clarendon's true and correct claims handling procedures, on or about February 6, 2007, ARM served plaintiff with a second set of discovery (R-277-290) These demands generally asked Clarendon to set forth the instances, and basis for those instances, where Clarendon: (i) disclaimed coverage when a TPA recommend that coverage be denied; (ii) awarded coverage even though a TPA said that coverage should be denied; (iii) disclaimed coverage when a TPA said that coverage should be awarded; and (iv) awarded coverage when a TPA recommenced that coverage be awarded.

Following correspondence (R-291-293), Clarendon "responded" by refusing to answer these demands (R-471-484), claiming, again, that the material is not relevant and that it would be unduly burdensome to respond.

***10** On or about May 22, 2007, Clarendon moved and ARM cross-moved to compel responses to discovery. (R-39-190 and R-191-380, respectively). The specific subject of ARM's cross-motion was just the outstanding demands from the First and Second Sets of Discovery discussed above. (R-80-93 and 277-290)

While the motion and cross-motion (R-39-190 and R-191-380), were pending, and given that Clarendon was -- and is -- busily trying to lay upon ARM, its TPA, the burden of Clarendon's own decisions, on or about May 28, 2007, ARM served a third set of discovery (R-485-495), that sought discovery into other instances where Clarendon is suing its TPA's for decisions that Clarendon made which it seeks to foist upon the TPA. Here, too, Clarendon refused to fully and completely respond. (R-496-505). Even after good faith correspondence from defendant (R-506), Clarendon refused to provide the requested information (R-507-509).

By order filed August 29, 2007, the Court addressed, *inter alia,* ARM's May 22, 2007 discovery cross-motion and, *at that time* -- neither ordered Clarendon to respond nor ruled that ARM was not entitled to that discovery. (R-510-518) Instead, the parties were directed to conduct a deposition of a Clarendon representative knowledgeable about Clarendon's record keeping and computer capabilities.

***11** That deposition, of Barry Stinson, was conducted on October 17, 2007. (R-519-572). Mr. Stinson testified that Clarendon's computers are "networked" and Clarendon can search e-mails on a "global" rather than case-by-case basis. (R-536). Furthermore, Mr. Stinson testified that Clarendon's computer system can produce lists of certain "subsets" of files, such as liability claims that were closed without payment. [2] (R-548-549, 556)

Without waiving its right or entitlement to all the discovery previously sought, on or about October 30, 2007, ARM served a fourth set of discovery demands (R-573-582), based explicitly on the Stinson testimony. ARM demanded, *inter alia*, that plaintiff identify - and produce - the claims files of cases which have e-mails containing certain key words such as "coverage", "denial", "request", "authorization", etc. Again without waiving its entitlement to complete discovery, ARM demanded that Clarendon identify, and produce, the claims files for liability cases that were closed without payment since a case closed without payment would, inevitably, include a determination that there was no coverage available. Once again, Clarendon failed to fully respond. (R-583-592), despite good faith correspondence from ARM (R-593)

***12** At a Court appearance on December 6, 2007, the parties were directed to enter into a stipulation to resolve whatever discovery issues that could be agreed upon. The issues that could not be agreed upon, namely ARM's outstanding discovery into Clarendon's true and correct claims handling practices, were to be addressed via a briefing schedule putting the matter before the trial Court for resolution.

The parties agreed (R-13-15), that by December 21, 2007, ARM would submit its papers setting forth why it was entitled to full disclosure from Clarendon, including the demands that were not addressed (since they had not yet been promulgated), in the May 22, 2007 cross-motion, namely the Third and Fourths set of discovery demands, R-485-495 and R-573-582, respectively.

Clarendon's objection was due December 28, 2007 and defendants' Reply was due January 2, 2008. (R-13-15) Upon information and belief, this schedule was reviewed and approved by the Court's Law Secretary.

However, *before* ARM's submission was even received by the trial court, and before the trial court had an opportunity to review the relevance of ARM's third and fourth set of discovery, the trial court annotated the agreed-upon stipulation, *striking* the provisions that directed ARM to outline the remaining discovery and explain why ARM was entitled to that material from Clarendon. (R-15). Instead, the trial court wrote that it "declined to order such responses."

***13** However, the Court offered no explanation whatsoever for why it was declining to order Clarendon to fully respond to the first and second set of discovery. The annotated Order further failed to acknowledge that there were discovery demands (that is, the third and fourth set of discovery), that had, at that point, not yet been put before the trial court for review.

In other words, the trial court "denied" ARM's cross-motion seeking responses to the third and fourth set of discovery without the briefing the Court had suggested and without ever reviewing much of the discovery sought in the third and fourth sets of discovery.

The trial court also issued an Order (R-6-7), denying ARM's motion for production of Clarendon's list of TPAs. The Court held that "it is undisputed that none of Clarendon's other TPA's were parties to the contract at issue or involved in the events at issue in this action."

On or about January 17, 2008, ARM moved for renewal and reargument of so much of the Court's decisions of December 6, 2007 which declined to order Clarendon to fully respond to the first and second sets of discovery. At the same time, ARM moved to compel Clarendon to fully respond to the third and fourth sets of discovery. (R-427-661.)

While these motions were pending, discovery, of course, proceeded apace. By early January, 2008 ARM had commenced, but had not yet had an ***14** opportunity to complete -- the deposition of Clarendon's "regular" coverage counsel, Ira Lipsius, Esq. (R-601-631) Mr. Lipsius confirmed that Clarendon regularly gets involved in the specifics of coverage analysis by, *inter alia,* directing its TPAs to procure coverage opinions. Mr. Lipsius estimated that for years, he has

received between one and five instances a month -- including at least one involving ARM -- where Clarendon has directed a TPA to obtain a coverage analysis from him. (R-615)

ARM could not retain coverage counsel on its own as that was the province of Clarendon. (R-657-658)

Based on this testimony, ARM served a fifth set of discovery demands on or about January 18, 2008 (R-787-797), that, *inter alia*, sought Mr. Lipisus' files concerning the Pittenger matter and those other matters where a TPA (including but not limited to ARM), was directed by Clarendon to have Mr. Lipsius provide a coverage analysis for Clarendon's benefit. Clarendon initially refused to respond (R-798-807), despite "good faith" correspondence from ARM (R-808-809) Although Clarendon ultimately produced Mr. Lipsius' files regarding the Pittenger matter alone, it has never produced Mr. Lipsius' files regarding other matters where he provided coverage analysis on Clarendon's behalf and at Clarendon's behest.

***15** The balance of the discovery sought in the fifth set of discovery has to do with the damages that Clarendon might hope to recover from ARM. In particular, ARM queries whether any of Clarendon's alleged losses were not true "damages" to the extent they were covered or reimbursed by insurance. Recall that Clarendon seeks over $5 million from ARM. ARM is surely entitled to force Clarendon to set forth proof of its actual damages, that is, whether it paid these sums out of its own pocket. If, for example, some insurer or reinsurer ultimately bore the cost of resolving the underlying matters, then Clarendon would be attempting to engineer an inappropriate windfall in seeking "recovery" for a nonexistent "loss" from ARM.

By decision dated July 14, 2008 (R-28-30), the trial court denied ARM's motion for reconsideration regarding the first and second set of discovery. As is pertinent to this appeal, however the trial court also denied ARM's motion seeking to compel Clarendon to respond to ARM's third and fourth sets of discovery. By decision dated August 5, 2008 (R-21-22), the trial court denied ARM's motion to vacate the Note of Issue. As is most relevant to this appeal, however the August 5, 2008 decision also denied ARM's motion seeking to compel Clarendon to fully respond to the Fifth Set of Discovery.

This appeal, then, addresses Clarendon's cumulative failures to respond to the discovery sought in each of ARM's various discovery demands.

16** ***Argument

THE TRIAL COURT IMPROPERLY DENIED ARM THE DISCOVERY IT NEEDS TO DEFEND ITSELF IN THIS ACTION

It is axiomatic that a defendant is entitled to discovery as to the two key elements which make up any plaintiff's case: liability and damages. *See, e.g.,* CPLR 3101(a), "There shall be full disclosure of all matter material and necessary in the...defense of an action, regardless of the burden of proof." This disclosure provision is to be "liberally construed" with the test of whether production is warranted being whether the material sought is "useful." The information requested need not be shown to be "indispensable" but rather must only be "needful" and sufficiently related to the subject matter of the action to be "reasonable." *Allen v. Crowell Collier Publishing Co.*, 21 N.Y.2d 403, 288 N.Y.S2d 449 (1968); *Cilone v. Wilson Safety Products. Inc.,* 229 A.D.2d 372, 644 N.Y.S.2d 562 (2d Dep't 1996.)

The words "material and necessary" are to be interpreted liberally and mandate disclosure of any facts bearing on the dispute between the parties. *Marten v. Eden Park Health Services. Inc.*, 250 A.D.2d 44, 680 N.Y.S.2d 750 (3d Dep't 1998.) Even if a court feels that there is no showing of willfulness or bad faith on behalf of plaintiff in failing to provide defendant with discovery, *Reade v Dickson*. 150 A.D.2d 543 (2d Dep't 1989), there should be no hesitation in ***17** compelling Plaintiff to provide defendant with responses to the discovery demands in a timely fashion.

It is well established that under liberal discovery principles, a party is entitled to discovery into other matters, not directly at issue in the subject litigation, that show a party's true practices and business experience. For example, in *Goldberg v. Blue Cross of Northeastern N. Y.*, 81 A.D.2d 995 (3d Dep't 1981), plaintiff sought to have defendant pay his medical bills. The Court granted plaintiff discovery into defendants' payment policies *for other matters* besides his. Similarly, in *Greater New York Mutual Insurance Company v. - Lancer Insurance Company,* 203 A.D.2d 515, 611 N.Y.S.2d 35 (2d Dep't 1994), there was a dispute between two insurers as to which carrier had liability for a judgment against their mutual insured. Defendant sought discovery into plaintiff insurer's interpretation of various policy provisions. The Court awarded defendant "intra company communications bearing generally on [defendants'] construction of the relevant policy language." In other words, discovery into matters well beyond the facts of the particular dispute was allowed. [3]

***18** Also relevant to the instant appeal is *Austin v. Calhoon,* 51 A.D. *2d* 958 (1st Dep't 1976). There, plaintiff was trying to procure a medical disability pension and sought files and information from an insurer about numerous other cases instances where disability pensions were sought. The basis for plaintiffs' request was that he needed to ascertain defendants' "approach to consideration of such claims." The court recognized that plaintiff was entitled to that production, holding that he was entitled to discern the true nature of defendant's general practices vis-a-vis these types of claims. [4] In accord is *Rodolitz v. Beneficial National Life Insurance Company*. 41 A.D. 2d 707, 341 N.Y.S.2d 278 (1st Dep't 1973) where the court ordered the production of documents pertaining to *other insureds who had submitted claims similar to those of the plaintiff)*.

This concept is not unique to New York. *See* e.g., *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.,* 117 F.R.D. 292 (D.D.C. 1987) (involving a general comprehensive liability policy and ordering production of information relating to similar claims by other insureds); and *Colonial Life & Accident Insurance Co. v. Superior Court* 31 Cal. 3d 785 (1982) (en banc) (allowing the production of information pertaining to other insureds with similar accident policies and noting that the insurer's dealings with other ***19** insureds is relevant to establish whether the insurer's general business practice was to engage in unfair settlement practices).

In the case at bar, Clarendon seeks to recover from ARM over five (5) million dollars based on what is alleged to be Clarendon's reliance upon ARM and ARM's alleged failure to properly investigate certain underlying claims. However, it is undisputed that the agreement between ARM and Clarendon provided that it was Clarendon, not ARM, who made final discovery decisions.

Clarendon has consistently claimed that it relied, with almost perfect faith, on its TPA's to, not only make coverage recommendations, but also to provide Clarendon with the information that it [Clarendon] needed to render the final determination as to coverage. However, TPAs such as ARM could not deny coverage without Clarendon's review and agreement. In response to a TPA's request to deny coverage, Clarendon could:
- agree;

- disagree and direct that coverage be extended;

- ask the TPA for further information to justify the requested denial;

- direct the TPA to obtain a coverage opinion from counsel;

- direct the TPA to extend coverage subject to a reservation of rights;

***20** - commence a declaratory judgment action; or

- any combination of the above.

(R-539-541)

In addition, Clarendon's "regular" coverage counsel, Ira Lipsius, Esq., also confirmed that Clarendon regularly gets involved in the specifics of coverage analysis by, *inter alia*, directing its TPAs to procure coverage opinions. Mr. Lipsius estimated that for years, he has received between one an five instances a month -- including at least one involving ARM -- where Clarendon has directed a TPA to obtain a coverage analysis from him. (R-615) ARM could not retain coverage counsel on its own as that was the province of Clarendon. (R-657-658.)

By demanding that all proposed disclaimers be sent to it, by retaining the ability to seek out coverage opinions and by retaining final authorization to approve denials of coverage, Clarendon is predominantly -- if not wholly -- responsible for the erroneous disclaimer. Because Clarendon retained for itself the sole right to deny coverage, Clarendon cannot foist sole and exclusive responsibility onto ARM by claiming that ARM "did all the analysis" and Clarendon violated its own agreement and merely "rubber stamped" ARM's decisions. Since Clarendon has acknowledged that it could have taken any number of steps following receipt of a coverage recommendation from ARM, it is disingenuous at best for Clarendon to, instead, argue that when it received ***21** ARM's coverage recommendation vis-a-vis the Pittenger, it, in essence, had "no choice" but to blindly follow ARM's lead. Here, like in *Austin* and *Greater New York*, ARM seeks discovery into Clarendon's actual claims handling practices, the way Clarendon related to its TPA's and the depth of Clarendon's involvement in coverage decisions. The true nature of Clarendon's claims handling with its TPA's is thus extremely relevant to Clarendon's "ownership" of the decision to deny coverage pertaining to the Pittenger claim.

Moreover, even if Clarendon cannot respond to such demands absent a physical review of the claims files, ARM should not have to bear the cost of the same. Clarendon chose to commence this action against its erstwhile agent and seek millions of dollars in purported damages. Clarendon must bear the cost of that endeavor. *See also Morgan v. Dell Publishing Co., Inc.*, 185 A.D.2d 876, 586 N.Y.S.2d 1004 (2d Dept 1992); and; *Gehen v. Consolidated Rail Corporation*, 289 A.D.2d 1026, 735 N.Y.S.2d 701 (4th Dept 2001), each holding that expenses incurred by a party to comply with its discovery obligations should be paid (at least initially), by the party incurring the expenses.

The second broad area where Clarendon is improperly avoiding discovery has to do with Clarendon's knowledge of the law and its unjustifiable "reliance," therefore, on ARM's advice. ARM is entitled to this information because Clarendon was in a better position than ARM to know that there existed the ***22** possibility that ARM's denial recommendation should not have been approved and would not withstand judicial scrutiny. Mr. Stinson has already testified that Clarendon received "newsletters" or other coverage updates from counsel keeping it abreast of developments in the law. (R-553). In addition, as set forth in the accompanying affidavit from Otto Kieslich (R-658), Ira Lipsius, Esq, Clarendon's regular coverage counsel advised Mr. Kieslich that he had discussed the area of law that rendered ARM's coverage recommendation suspect in a newsletter that was sent to Clarendon but not to ARM prior to ARM's request to Clarendon for authorization to deny coverage for the Pittenger claim.

In objecting to this response, Clarendon argued in part, that such material was protected by the attorney-client privilege. However, also as set forth in the accompanying affidavit from Mr. Kieslich, these attorneys were representing ARM in the underlying actions just as much as they were representing Clarendon. ARM retained these attorneys, dealt with them and viewed them as "its" attorneys. Attorney McCandless, certainly, recognized a potential conflict in his role vis-a-vis ARM and Clarendon and had ARM and Clarendon agree to his *de facto* dual representation.

At the depositions of ARM personnel, it was Attorney McCandless who met with ARM, counseled them and defended them. Mr. McCandless appeared at ARM's depositions, spoke with ARM personnel confidentially in advance of ***23** the deposition to prepare for the same and asserted objections and qualification to questions on ARM's behalf. Similarly, ARM retained Attorney Lipsius. (R-632-651, 658-659.) It is ludicrous, therefore, for Clarendon to suggest that ARM should be deprived of information and/or documents from counsel that represented it.

Moreover, the fact that the material requested may have been generated by counsel in another action does not preclude it for being produced in the instant litigation. *Milone v. General Motors Corporation.* 84 A.D.2d 921 (4th Dep't 1981); *Chemical Bank v. Arthur Anderson,* 143 Misc.2d 823, 541 N.Y.S.2d 327 (S. Ct. N.Y. Co. 1989)(report prepared in one case was not "material prepared for purposes of litigation" in the case where disclosure was actually sought.") *Kamvr v. Combustion Engineering, Inc.*, 161 A.D.2d 233, 554 N.Y.S.2d 619 (1st Dep't 1990)(material produced in an arbitration proceeding was discoverable in separate litigation.)

As set forth above, Clarendon was in the position to recognize ARM's alleged error and refuse to authorize the denial. It was for just that reason that Clarendon kept for itself the ultimate decision to deny coverage to one of its insureds. In point of fact, the entire relationship between Clarendon and ARM was designed such that Clarendon, and not ARM, retained the final say-so on coverage denials. In other words, Clarendon -- and not ARM -- was the crucial ***24** "line of defense" to prevent erroneous denials of coverage. Consequently, Clarendon bears significant responsibility for the underlying Pittenger coverage decision as evidenced by the fact that Clarendon made the decision based on its own knowledge (not just knowledge forwarded by ARM), to deny coverage. The precise contours of how, and why, Clarendon made the decisions that it did is, therefore, both relevant and necessary.

Clarendon should not be heard to argue that its relationship with ARM was singular and unique and not connected to its relationship with other TPA's or how it handled coverage analysis presented to it by them. As set forth in the Kieslich affidavit (R-656-661), Clarendon drafted the Claims Administration Agreement that governed the relationship between Clarendon and ARM that dictated what ARM could, and could not do, vis-a-vis claims administration. Also according to Mr. Kieslich, Bryan McCully, Clarendon's then Senior Vice President for Claims advised him that the Claims Administration Agreement between Clarendon and ARM was substantially similar, if not identical, to the Claims Administration Agreements that govern Clarendon's dealings with its other TPA's, including as concerns a TPA's rights and obligations vis-a-vis coverage. Consequently, the way that Clarendon interacted with its other TPA's is indicative of the true scope and breath of Clarendon's involvement in coverage decisions. As discussed above, Clarendon has admitted that it had a range of ***25** options it could pursue when it relieved a recommendation from a TPA that it [Clarendon] deny coverage.

Here, it is respectfully submitted that, by issuing its December 6, 2007 decision (R-13-15), before the agreed-upon schedule, the trial court clearly did not have an opportunity to fully consider why the requested discovery is necessary.

Moreover, ARM respectfully submits that the trial court misapprehended a key issue in this litigation. In so much of its decision that denied ARM's motion seeking the identity of Clarendon's "other" TPAs (R-6-7), this Court stated that following an August 14, 2007 conference the only outstanding discovery issues were whether: (i) ARM was entitled to information about Clarendon's TPAs; (ii) non-party depositions could proceed; and (iii) ARM had to provide Clarendon with insurance information.

However, the August 29, 2007 Order that followed that conference (R-510-518), actually noted that there were but a few discovery issues that were actually ripe for the Court's attention. Those were, indeed, the issues the Court cited in the December 6, 2007 decision. However, the August 29, 2007 decision (R-510-518), specifically noted that there were issues that were not ripe for the Court's resolution. This very specifically included the discovery issues outlined above concerning Clarendon's actual claims handling practices and how it was kept ***26** abreast of developments in the law. These issues were *specifically* "tabled" until *after* the Stinson deposition that was also discussed in the August 29, 2007 Order. Thus, it is respectfully submitted that the trial court erred in its characterization of what discovery was actually outstanding when it averred in its decision of December 6, 2007 (R-6-7), that "only" the three issues discussed above remained outstanding.

Moreover, ARM respectfully submits that the trial court erred in applying too narrow a lens on the scope of discovery. In its decision regarding the production of Clarendon's TPA list, the Court held that those TPAs were not party to the contract between Clarendon and ARM nor where they involved in the underlying Pittenger claim. However, this case cannot be viewed strictly through the narrow blinders of what Clarendon did upon receipt of ARM's coverage analysis in this particular underlying case involving Leroy Pittenger and Kephart Trucking. The reason *why* Clarendon acted as it did when faced with ARM's analysis is key to determining whether Clarendon is correct when it contends, as it dos now, that it bears no liability or responsibly for the subject denial to Kephart.

The way Clarendon acted and interacted with its other TPAs, in other instances, under the same (or similar) claims handling agreements is a more accurate and complete depiction of how Clarendon really handles and reviews its ***27** claims. The Court's decision denying ARM the discovery it needs to establish its defense -- that Clarendon was the true "decider" vis-a-vis coverage -- is unfair and inequitable.

Moreover, reversal is appropriate because the Court issued its decisions denying ARM's motions for discovery (R-6-7, 13-15), before ARM ever had an opportunity to present its full arguments in favor of discovery and before the Court even reviewed the discovery ARM sought. In this regard, ARM's initial discovery cross-motion of May 22, 2007, did not even address much of the discovery that was to be put before the Court as per the agreed-upon stipulation. This includes the Third Set of Demands (R-485-495), and the Fourth Set of Demands (R-573-582) The reason for this is that these demands had not been promulgated at the time of the May 22, 2007 cross-motion. In fact, the Fourth Set of demands flowed from the Stinson deposition (R-519-572), that was the subject of the August 29, 2007 Order (R-510-518.)

Thus, the December 6, 2007 decision (R-13-I5), effectively deprived ARM of its day in Court concerning that discovery. The Court denied defendant's motion for discovery without ever reviewing all the discovery that was to be the subject of the motion. ARM could not have previously provided the material to the Court since it was the Court's action that deprived ARM of that ability.

***28** The Court's decision of July 14, 2008 (R-28-30), denying ARM's application to compel production off responses to the third set of discovery (R-485-495), and the fourth set of discovery (R-573-582), failed to state any reason why such discovery was not warranted and instead declined to even "consider" the same.

Similarly, the trial court's decision of August 5, 2008 (R-21-22), denying ARM's motion to compel responses to the fifth set of discovery (R-787-797), too, did not provide any basis for why that discovery was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

However, ARM respectfully submits that the trial court erred in such decisions. Regarding the third and fourth sets of discovery, the trial court failed to explain why it would not even "consider" ARM's motion to compel responses to the third and fourth sets of discovery at the same time as it pondered ARM's motion for renewal and reargument vis-a-vis the first and second sets of discovery. To the contrary, ARM respectfully submits that joint consideration of all of ARM's discovery applications that were ripe (excepting the fifth set which had not yet been promulgated), *was* appropriate. Such joint consideration would be a economic use of judicial resources as it would allow all the then-pending issues to be resolved at once rather than piecemeal. See *Metropolitan Marking Corp. v. Basso*. 118 A.D.2d 835, 500 N.Y.S.2d 319 (2d Dep't 1986)(granting ***29** motion to add a party that was apparently made along with a motion to renew prior motion to compel discovery). Moreover, CPLR Sec. 2221 provides, on its face, that a motion to reargue can be made simultaneously and jointly with a motion to renew. Just as joining these two separate and distinct "reconsideration" motions saves judicial resources, so, too, does combing the above referenced discovery motions (motion for reconsideration concerning the first and second sets and "initial" motion to compel regarding the third and fourth sets), conserve scarce judicial resources.

Regarding the fifth set of discovery demands, the trial court stated, denied that motion to compel (which was made along with the motion to strike the note of issue), without explanation, stating only that the moving papers failed to "establish the specific relevance" of those demands. However, as indicated above, the specific discovery demands at issue in the fifth set of discovery seek Clarendon's coverage counsel's files regarding matters where he provided Clarendon with coverage analysis. The relevance of these demands is clear. As indicated above, Clarendon's suit against ARM is predicated upon the theory that Clarendon, inevitably, relied upon ARM to do all the research and analysis that was necessary before Clarendon decided whether or not to extend coverage to an insured. However, Clarendon, and its coverage counsel have testified to the contrary. They have confirmed that Clarind took an active role in reviewing ***30** whether coverage was available to a Clarendon insured. As such, ARM is entitled to discovery to actually determine what was Clarendon's true and precise claims handling practices. Was it to "rubber stamp" a TPA's recommendation (as Clarendon claims in seeking to shift all responsibility onto ARM for the underlying Pittenger matter), or does Clarendon bear its own share of the burden?

The balance of the items at issue in the fifth set of discovery are, it is respectfully submitted, equally relevant. These have to do with Clarendon's actual losses. If the underlying Pittenger settlement was covered by insurance or reinsurance, then Clarendon has no business trying to "recoup" these "non-losses" from ARM. As indicated above, a defendant, such as ARM, is surely entitled to discovery to determine what its true liability to plaintiff (Clarendon) might be.

The Pace of Discovery

ARM respectfully submits that neither party has been remiss in proceeding with discovery. This matter was first brought to the Court's attention via a Request for Judicial Intervention ("RJI"), that was filed on or about August 30, 2006 involved leave to take certain non-party out-of-state depositions.

However, on or about January 11, 2007, the Court issued an Order (R-139-140), that, in part, directed that these non-party depositions not proceed until the completion of "paper discovery." Thereafter, ARM sought to move this case ***31** forward by seeking relief from that limitation. It was not until October 24, 2007 that this matter was resolved via plaintiff agreeing that the depositions could go forward. (R-654-655) The parties thereupon promptly continued with practice outside New York State to effectuate these depositions. Subject to the schedules of these non-parties, these depositions are being still being scheduled, even as the balance of discovery, motions and this appeal have gone forward.

***32** *CONCLUSION*

For all the aforesaid reasons, it is respectfully submitted that the decision of the trial court should be reversed in all respects and ARM should be awarded all of the discovery it seeks and which is necessary to defend itself in this multi-million dollar case.

Footnotes

1 The Court's December 6, 2007 decision in this regard (R-7), is discussed *infra*.

2 "Liability claims" refer to actions, such as the underlying Pittenger matter, which involved a claim by a third-party against a Clarendon insured.

3 Although the court there declined "at th[e] time" of the motion then before it to order defendant to produce the actual files, it specifically noted that such relief could be sought following discovery of the communications that had to be disclosed.

4 The Court also held that the files should be subject to an in *camera* review to protect confidential information. ARM has always been and remains, more than willing to make whatever reasonable arrangements that may be required to protect whatever "confidential information" as may exist in the sought after files.

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